

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

FERNANDO VALDES,

Defendant.

Case No.: 15cr2822-CAB

**Order Denying Motion
To Reduce Sentence
[Doc. No. 323]**

Before the Court is defendant Fernando Valdes' motion to reduce his sentence and order his immediate release to home confinement under 18 U.S.C. § 3582(c)(1)(A)(i) and the Coronavirus Aid, Relief and Economic Security Action (CARES Act) directive issued by the U.S. Attorney General. [Doc. No. 323.] Government opposed. [Doc. No. 328.] The defendant filed a reply. [Doc. No. 331.] The Court finds the motion suitable for determination on the papers. The motion is DENIED.

I. Background

The defendant was indicted on November 6, 2015, with others for conspiracy to commit Honest Services Mail Fraud and Health Care Fraud, in violation of 18 U.S.C. § 1349, among other charges. [Doc. No. 1.] He was arraigned on the indictment and posted bond on November 12, 2015. [Doc. No. 16.] On July 13, 2017, he entered a guilty plea admitting that for at least five years he participated in a scheme to commit honest services mail fraud and healthcare fraud to obtain money from California Workers' Compensation insurers by submitting claims for treatments that were secured through a pattern of bribes

1 and kickbacks to doctors. [Doc. No. 125.] The defendant remained on bond until his
2 sentencing which was continued until his last co-defendant entered a guilty plea, as he
3 agreed to testify if needed. On December 20, 2019, the Court sentenced the defendant to
4 eight months in the custody of the Bureau of Prisons (BOP), followed by a three-year term
5 of supervised release. [Doc. No. 291]. Defendant commenced his custodial sentence on
6 February 3, 2020. [Doc. No. 302.] At this time, he has completed just over half his term
7 of incarceration.

8 The defendant is a 55-year old U.S. citizen and an ordained deacon of the Episcopal
9 Church in the Diocese of Los Angeles. His involvement in the offense of conviction was
10 lengthy but he was not the organizer and was cooperative with law enforcement when the
11 scheme was detected. He was involved in a violation of certain the financial terms of his
12 pretrial release but reported the violation to Pretrial Services. He was otherwise compliant
13 while on bond and demonstrated remorse for his actions. His criminal history was limited
14 to one prior conviction for theft related to falsifying documents in the loan industry in 1986.
15 His plea in that case was subsequently set aside and the case dismissed. The defendant has
16 no history of addiction or mental health issues. He obtained employment during his pretrial
17 release as the Operations Manager for St. John's Episcopal Cathedral in Los Angeles and
18 has the support of the church leader and community. [Doc. No. 242; Doc. No. 323-3, at
19 2.]

20 On April 8, 2020, the defendant submitted a request to the unit manager at his facility
21 for immediate release to home confinement to avoid exposure to the COVID-19 virus. He
22 did not identify any personal underlying health risk and described himself as "relatively
23 healthy." [Doc. No. 323-1, at 13.] His attorneys subsequently supplemented his request on
24 April 9 and 28, 2019, with medical information that the defendant had been diagnosed as
25 pre-diabetic just prior to his self-surrender to custody. [Doc. No. 323-1, at 7-8.] The acting
26 warden denied the defendant's request on May 13, 2020. [Doc. No. 323-1, at 10.] On May
27 19, 2020, the defendant further supplemented his request for release to home confinement
28 with information that, based on his Body Mass Index (BMI), he is borderline obese. [Doc.

1 No. 323-1, at 6.] There is no record of any further response from the acting warden
2 following the defendant's supplemented request.

3 On May 6, 2020, the defendant filed a motion under 18 U.S.C. § 3582(c)(1)(A) with
4 the Court for a reduction in his sentence and release to home confinement. [Doc. No. 308.]
5 The Court denied the motion without prejudice because the defendant's motion had not
6 met the exhaustion requirements of § 3582(c)(1)(A). [Doc. No. 322.] On June 1, 2020,
7 the defendant moved again for a sentence reduction. [Doc. No. 323.]

8 As the movant, the defendant bears the burden to establish that he is eligible for a
9 sentence reduction. *United States v. Varnado*, 2020 WL 2512204, at *1 (S.D. Cal., May
10 15, 2020); *United States v. Holden*, 2020 WL 1673440, at *3 (D. Or., April 6, 2020.)

11 II. Exhaustion Requirement

12 Under 18 U.S.C § 3582(c), a court may not modify a term of imprisonment once it
13 has been imposed except upon motion of the Director of the BOP, or upon motion of the
14 defendant. Before filing such a motion on his own, the defendant must first petition the
15 BOP to file such a motion on his behalf. A court may grant the defendant's own motion
16 for a modification in sentence only if the motion was filed "after the defendant has fully
17 exhausted all administrative rights to appeal a failure of the BOP to bring a motion on the
18 defendant's behalf" or after 30 days have passed "from the receipt of such a request by the
19 warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A).

20 The defendant initially submitted his request for release to home confinement to the
21 BOP on April 8, 2020. He subsequently supplemented that submission with additional
22 information for the BOP to consider in evaluating his request, the last supplemental
23 submission made on May 19, 2020. Proper exhaustion requires the inmate present the
24 same factual basis for the compassionate-release request to the warden as he presents to
25 the court. *See United States v. Mogavero*, 2020 WL 1853754, at *2 (D. Nev. 2020).

26 Thirty days had not expired at the time the defendant refiled his motion with the
27 Court, based on all the same factors he has collectively submitted to the BOP to consider.
28

1 However, the thirty days have now expired since his final submission to the BOP, so the
2 Court considers the motion on the merits.

3 III. Compassionate Release Considerations

4 If the exhaustion requirement is met, a court may modify or reduce the defendant's
5 term of imprisonment after considering the factors set forth in 18 U.S.C. § 3553(a), if the
6 court finds that "extraordinary and compelling reasons" justify the reduction and that "such
7 a reduction is consistent with applicable policy statements issued by the Sentencing
8 Commission." 18 U.S.C. § 3582(c)(1)(A)(i).

9 The Court considered the § 3553(a) factors at the time of sentencing and those
10 considerations remain largely unchanged. The defendant was involved in a lengthy
11 conspiracy to fraudulently obtain money from workers' compensation insurers. His
12 sentence included an order of forfeiture of \$192,000. A non-violent offender with no
13 significant criminal history, the defendant was cooperative in the investigation of the
14 offense and was forthcoming regarding a violation of the conditions of his supervised
15 release. He is 55 years old, has no substance abuse or mental health issues and reported no
16 physical health issues at the time of his sentencing. During his pretrial release he obtained
17 employment as the operations manager of a church and has the support of the church
18 community. He demonstrated great remorse for his conduct and is considered a low risk
19 of reoffending.

20 The Court considered all the factors, including the seriousness of the offense, the
21 need for general deterrence and the defendant's personal characteristics and other
22 mitigating factors in arriving at a below guideline (21-27 months) sentence of eight months.
23 [Doc. No. 294.] The defendant has served approximately half of that sentence.

24 A factor the Court did not, could not, consider at the time of sentencing was the
25 coronavirus pandemic and the consequences it would have on incarcerated populations.
26 Pursuant to the Coronavirus Aid, Relief and Economic Security Action (CARES Act), PLI
27 116-136, Section 12003(b)(2), the U.S. Attorney General issued a directive to the Director
28 of the BOP, upon considering the totality of the circumstances concerning each inmate, to

1 designate qualified inmates for home confinement to mitigate the risks of COVID-19
2 transmission in BOP institutions and for the safety of inmates most vulnerable to the virus
3 and who pose the least threat to the community.

4 The CARES Act directive authorized the release of prisoners to home confinement
5 who meet the following criteria: 1) demonstrate a suitable confinement plan; 2) pose no
6 risk to society; 3) possess a low PATTERN score; and 4) have underlying CDC-defined
7 health risks that make him most vulnerable if exposed to the virus.

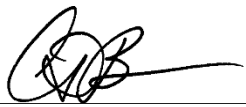
8 The defendant has demonstrated a suitable confinement plan, is a non-violent
9 offender and represents he has a low PATTERN score (a representation that is not disputed
10 by the government). He does not however meet the CDC criteria of those most vulnerable
11 to serious risk of complications if exposed to the virus, i.e., 65 or older, a chronic or serious
12 medical condition such as diabetes, or severe obesity (BMI of 40 or higher). The defendant
13 is 55 years old, is pre-diabetic and is borderline obese. Although he may be more
14 vulnerable than a younger and more fit prisoner, his age and conditions do not meet the
15 CDC criteria.

16 The BOP denied the defendant's request made pursuant to the CARES Act directive
17 for release to home confinement and this Court finds that the defendant's circumstances do
18 not meet the "extraordinary and compelling reasons" consistent with applicable policy
19 statements issued by the Sentencing Commission for a reduction in sentence. 18 U.S.C. §
20 3582(c)(1)(A)(i). The defendant has no serious medical condition, and his concerns about
21 potential exposure to the COVID-19 virus alone do not qualify as extraordinary and
22 compelling reasons to reduce his sentence.

23 Defendant's Motion to Reduce his Sentence is **DENIED**.

24 IT IS SO ORDERED.

25 Dated: June 19, 2020

26 
27 Hon. Cathy Ann Bencivengo
28 United States District Judge